Supreme Court, U.S.
FILED
JAN 26 2001
OFFICE OF THE CLERK

No. 00-1044

IN THE

Supreme Court of the United States

CARYN VOSKUIL,

Petitioner,

v.

ENVIRONMENTAL HEALTH CENTER - DALLAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

STEPHEN A. COKE
WESNER COKE & CLYMER, P.C.
Attorneys for Respondent
One Galleria Tower, Suite 2020
13355 Noel Road
Dallas, Texas 75240
(972) 770-2600

164763

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Environmental Health Center-Dallas, Inc. ("EHC") has no parent corporation and no publicly held company owns ten percent (10%) or more of the stock of EHC.

TABLE OF CONTENTS

	Page
Corporate Disclosure Statement Pursuant To Supreme Court Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	vi
Statement of the Case	1
A. Voskuil Is Not Asserting Merely A "Garden Variety" Claim of Discrimination	1
1. Voskuil's Physicians.	1
2. Evidence Obtained During Discovery of Documents Concerning Voskuil's Mental Condition.	2
3. Voskuil's Pleadings And Discovery Responses Placed Mental Condition at Issue.	4
4. Voskuil Introduced Medical Evidence As a Sword In Administrative and Legal Hearings While Asserting Psychotherapist Privilege As a Shield.	5
B. This Is Not a Case In Which Voskuil Simply Stood In Contempt To Preserve the Psychotherapist Privilege.	7

Contents

	Page
Reasons for Denying the Writ	12
I. The Courts Below Correctly Applied the Correct Analysis on Waiver of the Psychotherapist/Patient Privilege (Question Presented No. 1)	12
II. The Courts Below Did Not Abuse Their Discretion (Question Presented No. 2)	15
III. The Courts Below Correctly Held That Voskuil Was Not Legally Justified In Resisting Discovery And Seeking Appellate Review (Question Presented No. 3)	17
IV. Other Considerations Justifying Denial of the Petition	19
A. Certiorari Should Be Denied Since There Is No Conflict Among The Circuit Courts of Appeal	19
B. The Alleged Conflict Between The Circuits Results From a Single Massachusetts District Court	20
C. The Alleged Narrower View Identified In Vanderbilt Has Been Discredited ...	22
D. Supreme Court Consideration of This Evolving, Unsettled Area is Premature	22

Contents

Page

1. The *Jaffee* Case Was Decided Only Five Years Ago. 22

2. Only a Single Circuit Court of Appeals, the Eighth Circuit, Has Even Reached the Question Presented by Petitioner. 22

3. Even the Decisions of the Courts Below Were Unpublished and/or Failed to Fully Elaborate and Develop Their Analysis of the Psychotherapist/Patient Privilege. 23

4. This Court Should Wisely Allow These Issues to Percolate In the Lower Courts And Be Resolved by Additional Courts of Appeal Before Granting Certiorari. 23

E. Voskuil Failed to Properly Raise, Perfect and Preserve Her Claim of an Inability to Pay the Monetary Sanctions 24

F. Certiorari Should Be Denied Because This Case Is Properly Decided on More Narrow Grounds Than the Psychotherapist Privilege 26

Contents

		Page
G.	Certiorari Should be Denied Since this Case Presents No Compelling National Question	26
H.	Voskuil's Petition for Writ of Certiorari Should be Denied Because it Turns Solely Upon an Analysis of the Particular and Unique Facts Involved	27
Conclusion		28

TABLE OF CITED AUTHORITIES

Page

Cases:

Arizonans For Official English v. Arizona, 520 U.S. 43, 117 S. Ct. 1055 (1997) 23

Baker v. Ace Advertisers Service, 153 F.R.D 38 (1992) 16

Castillo v. Frank, 70 F.3d 382 (5th Cir. 1995) 16

Delta Airlines v. August, 450 U.S. 346, 101 S. Ct. 1146 (1981) 25

Dick v. New York Life Ins. Co., 359 U.S. 437, 79 S. Ct. 921 (1959) 26

Doolittle v. Ruffo, 1997 WL 151799 (N.D. N.Y.) .. 13

E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 135, 97 S. Ct. 965 (1977) 24

F.D.I.C v. Connor, 20 F.3d 1376 (5th Cir. 1994) ... 17

FDIC v. LeGrand, 43 F.3d 163 (5th Cir. 1995) 18

Fritsch v. City of Chula Vista, 187 F.R.D. 614 (S.D. Cal. 1999), *opinion modified by*, 196 F.R.D. 562 (S.D. Cal. 1999) 21

Gilbert v. California, 388 U.S. 263, 87 S. Ct. 1951 (1967) 28

Cited Authorities

Page

Goodman v. Lukens Steel Company, 482 U.S. 656, 107 S. Ct. 2617 (1987) 27

Huber v. Marine Midland Bank, 51 F.3d 5 (2d Cir. 1995) 24, 25

Jackson v. Chubb Corporation, 193 F.R.D. 216 (D. NJ. 2000) 21

Jaffe v. Redmond, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (U.S. Ill. 1996) 12, 13, 19, 20, 22

Kerman v. City of New York, 1997 WL 666261 (S.D. N.Y.) 13

Landscape Properties, Inc. v. Whisenhunt, 127 F.3d 678 (8th Cir. 1997) 25

Lanning v. Southeastern Penn. Transp. Auth., 1997 WL 597905 (E.D. Penn.) 13, 14

McCray v. New York, 461 U.S. 961, 103 S. Ct. 2438 (1983) 23

NHL v. Metropolitan Hockey Club, Inc., 96 S. Ct. 2778 (1976) 16, 18

Patrick v. Burget, 486 U.S. 94, 99, 108 S. Ct. 1658 (1988) 25

Cited Authorities

Page

Prince v. Poulos, 876 F.2d 30 (5th Cir. 1989) 16

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 75 S. Ct. 614 (1955) 26, 27

RTC v. Sands, 151 F.R.D. 616 (N.D. Tex. 1993) ... 16

Sabree v. United Brothers of Carpenters & Joiners 126 F.R.D. 422 (D. Mass. 1989) 14, 15

Sarko v. Penn-Del Directory Co., 170 F.R.D. 127 (E.D. Penn. 1997) 13, 14, 20, 22

Schoffstall v. Henderson, 223 F.3d 818 (8th Cir. 2000) 20, 22

Silva v. Witschen, 19 F.3d 725 (1st Cir. 1994) 24, 25

Smith v. Legg, 24 F.3d 650 (5th Cir. 1994) 25

Texas v. Mead, 465 U.S. 1041, 104 S. Ct. 1318 (1984) 27

United States v. Mendoza, 464 U.S. 154, 104 S. Ct. 568 (1984) 23, 24

Vanderbilt v. City of Chilmark, 174 F.R.D. 225 (D. Mass. 1997) 20, 21, 22

Vann v. Lone Star Steakhouse and Saloon of Springfield, Inc., 967 F. Supp. 346 (C.D. Ill. 1997) 13, 14, 20, 22

Cited Authorities

	Page
Wainwright v. City of New Orleans, 392 U.S. 598, 88 S. Ct. 2243 (1968)	25
White v. GMC, 908 F.2d 675 (10th Cir. 1990)	24
Wisniewski v. United States, 353 U.S. 901, 77 S. Ct. 633 (1957)	21
Statute:	
28 U.S.C. § 636(b)(1)(A)	16
Rules:	
F.R.C.P. 37	19
F.R.C.P. 37(c)	18
F.R.C.P. 72(a)	16
F.R.C.P. 72(b)	16
Fifth Circuit Local Rule 47.5.1	23
United States Supreme Court Rule 10	27
United States Supreme Court Rule 10(a)	20

STATEMENT OF THE CASE

The facts necessary to address the arguments set forth in the Petition for writ of certiorari filed by Petitioner Caryn Voskuil ("Voskuil") are adequately presented in the District Court and Fifth Circuit opinions which are incorporated herein by reference. *See Petition*, App. 17-24, 28-30, 34-36. However, the Statement of the Case presented by Voskuil is rife with misleading, inaccurate and erroneous assertions of fact and requires correction in the following two specific areas. First, Voskuil is not merely asserting a "garden-variety" claim of discrimination as discussed in Section A below. Second, this is not a case in which Voskuil in good faith simply stood in contempt in order to preserve her psychotherapist privilege as discussed in Section B below.

A. Voskuil Is Not Asserting Merely A "Garden Variety" Claim of Discrimination

Voskuil asserts that she merely alleges a "garden-variety" claim of discrimination. *Petition*, p. 10. Voskuil further denies alleging severe, on-going emotional distress, an independent claim for emotional distress or placing her medical condition at issue. *Petition*, pp. 4, 10. However, Voskuil comes to the legal conclusion that she suffered depression *as a result* of being sexually harassed, abused and discriminated against by her supervisor. *Petition*, p. 3. The following facts establish that the foregoing statements are misleading, inaccurate and erroneous.

1. *Voskuil's Physicians.*

a. *1982 - 1983 Undisclosed Physician.* During Voskuil's deposition she testified that the first time that she could recall having depression being a part of her daily life was when she was at the University of Texas in 1982-1983. R. 995,

1005:6-12. Voskuil sought medical treatment and received prescription drugs for her condition with an undisclosed physician. R. 1005:13-18. Voskuil decided to leave the University of Texas and return to Dallas because she got very depressed, felt really sad and wasn't happy with the program. R. 1002:10-1003:4. Voskuil's definition of this depression included feelings of hopelessness, unhappiness and that she was very miserable and things had to change. R. 1003:17-25; 1004:8-11.

b. *November 1992 - Dr. Khatami.* The next time Voskuil recalls being influenced by depression was after Voskuil returned from St. Louis and began working for Maritz Travel in 1992. R. 995, 1006:19-25. This second episode of depression also occurred prior to her commencement of part time work at EHC. R 1007:1-11. Voskuil sought medical treatment and received prescription drugs for a diagnosis of clinical depression from a Dr. Khatami in or about November 1992. R. 1008:23-1009:8; 1010:11-1011:13; 1018:18-24; Voskuil estimates that over a period of a couple of months, she saw Dr. Khatami for between 12-20 appointments. R. 1020:4-11.

c. *1992, 1995 - Present, Dr. Shelley Roatan* Voskuil received medical treatment including prescription drugs for depression from Dr. Roatan during at least two separate periods. Voskuil first sought medical treatment from Dr. Roatan at the time she was receiving treatment from Dr. Khatami. R. 1017:19-22; 1018:13-17. Voskuil changed medical plans and returned to Dr. Roatan in 1995 to the present date. R. 1017:19-1018:17; 1021:15-16. Dr. Roatan has prescribed drugs in treatment of her clinical depression. R. 1021:5-9.

2. *Evidence Obtained During Discovery of Documents Concerning Voskuil's Mental Condition.*

Discovery has revealed a history of mental disorders which existed long before her employment at EHC. As discussed

above, Voskuil first sought medical treatment for depression in 1982-1983, ten years **prior to** her employment at EHC. Voskuil suffered a second episode of depression **prior to** her employment at EHC. Voskuil has admitted in a Patient History form to her employment application at EHC that **prior to** her employment at EHC she suffered from depression, anxiety and had been under psychiatric care. R. 1571, 1718. In an Application For Disability Benefits dated March 30, 1995 (the "Application") produced by Voskuil during discovery and introduced into evidence at the Texas Employment Commission ("TEC") administrative hearing, Voskuil admitted to a similar condition as recently as November 1992, *four months prior to her employment at EHC*. R. 1571, 1720 Line 11; R. 995, 1034 Line 11. Voskuil also admitted that her illness *was not related to her occupation*. R. 1034, Line 7. Her physician lists her diagnosis as "*Major Depression, Recurrent*" and admits that *her disability was not caused by Voskuil's current or prior employment*. R. 1035, Line 2 and 1(d).

From December 28, 1994 through March 27, 1995, Voskuil was on medical leave pursuant to the Family and Medical Leave Act ("FMLA"). R. 1663. Correspondence from her psychiatrist states this medical leave was required due to a "*Major Depressive Disorder*" with symptoms including "severe anxiety, feelings of depression, crying, poor concentration, discouragement, lack of satisfaction in life, self-criticism, suicide thoughts, irritability, difficulty in making decisions, fatigue and loss of appetite." R. 1571, 1719. Her physician further stated that "our efforts to find an appropriate anti-depressant medication have not yet been adequately successful." *Ibid.*

3. *Voskuil's Pleadings And Discovery Responses Placed Mental Condition at Issue.*

The Magistrate Judge specifically made findings, reviewed and affirmed by the District Court and the Fifth Circuit, that Voskuil's mental condition has been placed at issue by her pleadings and discovery responses, including, without limitation, that: (a) "[a]s a result of the hostile environment, Plaintiff suffered an extreme episode of depression, and was at the point of committing suicide" R. Vol. 9, p. 41:21-25 citing Voskuil's complaint – R. 435, 439 § 31; (b) Voskuil was required to receive counsel from a therapist and took a medical leave from EHC because of the intensity of the depression (R. Vol. 9, p. 41:25-42:3 citing Voskuil's complaint – R. 435, 439 § 32-33; (c) "[in] December of 1994, as a result of the harassment, I became severely depressed and for health reasons took a leave of absence," Vol. 9, p. 42:3-42:1 citing Voskuil's Interrogatory Answers Nos. 2, 3, 6, 7, 16, 18, 20 – R. 1646, 1654-1663; (d) in response to an interrogatory concerning "any severe emotional distress allegedly caused by Defendants' conduct" Voskuil stated "as a result of the harassment and hostility I had become severely depressed and was having suicidal thoughts and had decided that my life was not worth living if I had to face that type of abuse each day," Vol. 9, p. 42:3-42:10 citing Voskuil's Interrogatory Answers No. 21 – R. 1646, 1708-1709; (e) Voskuil requested actual damages as front pay for essentially the rest of her life until the age of 72 which would be in 2027 (Voskuil's complaint – R. 435, 449-450 § 80; and (f) Voskuil claimed entitlement to exemplary/punitive damages for Defendants' intentional conduct" (R. 435, 446-448, 450 §72, 76 and 81).

4. *Voskuil Introduced Medical Evidence As a Sword In Administrative and Legal Hearings While Asserting Psychotherapist Privilege As a Shield.*

In addition to waiving the psychotherapist privilege by the allegations in her pleading, Voskuil waived the privilege by actually introducing privileged information and evidence as a sword during: (a) summary judgment proceedings; (b) at prior administrative hearings before the TEC; and (c) by citing such evidence in her Appellant's Brief. Voskuil admitted she saw both a psychiatrist and a therapist for depression on or before November, 1992, four months **prior** to her employment at EHC. R. 552, 572, para. 136-37. Voskuil concluded that the **causation** of her depression in or about November, 1992 was: (i) a medical illness and related treatment and pain suffered on a prior job; (ii) the death of her grandparents; and (iii) her inability to work consistently. R. 552, 585, para. 131-136, 212. Even after Voskuil recovered from her medical illness, the depression had not lifted. R. 572, para. 137. In November 1992, Voskuil's "therapist recommended a psychiatrist who would be able to prescribe medication for my depression." R. 572, para 137-38. Voskuil described how the subjects of her counseling sessions shifted from her depression as a result of her medical condition and other "pedestrian issues" to "primarily dealing with coping with my job." R. 565, para. 89. Voskuil had **ongoing** psychotherapy since at least prior to November 1992 (not including the prior episode in 1982-1983). R. 565, 572, 584-85, para. 89, 137, 138, 205-6, 207. In November 1992, **prior to** her employment at EHC, Voskuil was prescribed medication for anxiety and depression. R. 573 and 585, para. 139, 213.

In December 1994, Voskuil became "severely depressed and was having suicidal thoughts and had decided that my life was not worth living." R. 573, para. 140. Voskuil concluded that the causation of this depression was her employment at

EHC. *Ibid.* Voskuil wrote in her journal: "I felt it would be better to die than to continue to live like I was — dead" . . . "I wanted to buy Final Exit on the way home . . . just ready to end the waste, the sadness, the loss, the torture, I thought I'd have enough pills to do it — I wanted to — I meant to." R. 634. By December 28, 1994 "I became convinced that death was a viable alternative to returning to work." Voskuil concluded "I was unable to return to work due to the depression." R. 573, para. 141.

On January 3, 1995, Voskuil requested leave under the FMLA "for a period to be determined by my physician." R. 633. Voskuil periodically notified EHC of her physician's prognosis of her **ongoing** condition and her anticipated return to work, including letters and prescription pad memos from Dr. Statman dated January 3, January 31, February 28, March 29, April 10 and May 26, 1995, which were introduced by Voskuil as exhibits at the TEC administrative hearings. R. 995-996, 1028-1033, 1037. On March 21, 1995, Voskuil advised EHC that "[p]revious conversations with my doctor have indicated that I will begin by working part time (half days) and those should be afternoons." R. 638. Voskuil stated that her physician had only "released me to four hours of work per day." R. 577, para. 163. At the expiration of Voskuil's statutory 12 week leave under the FMLA, Voskuil concluded, based apparently upon her physician's prognosis, that "I could not immediately return to an eight hour work-day." R. 578, para. 171. Voskuil concluded, based upon her physicians prognosis, that "I had not been released to work for more than four hours per day" and "I could not . . . take the position as offered." R. 579, para. 175. On April 10, 1995, Voskuil's physician and psychiatrist Dr. Statman wrote a letter delivered to EHC describing her prognosis and stating that Voskuil "has my permission to return to work 6 hours per day as of Wednesday, April 12, 1995." R. 649.

Voskuil concluded that the causation of her "extreme anxiety" was the level of harassment at EHC. This extreme anxiety required increased amounts of prescribed medication which she was required to continue to take for extended periods. R. 584-586, para. 205, 214. Presumably at her physician's direction, Voskuil "required increased therapy to deal with the anxiety and harassment issues." R. 585, para. 206. Voskuil had an ongoing psychiatric condition since Voskuil stated "I need to continue therapy, but currently am financially not capable", more than 22 months after her resignation at EHC. R. 585, para. 208. Voskuil's then present need for ongoing therapy had spanned a period of at least 4 years and 4 months, November 1992 through February 1997 (not including the prior episode of depression in 1982-1983). At the TEC administrative hearing, Voskuil introduced the Application, wherein Voskuil admitted her illness was not related to her occupation, her physician admitted that her disability was not caused by Voskuil's current or prior employment and her physician listed her diagnosis as "Major Depression, **Recurrent**." R. 995-996, 1034-35.

Voskuil used the foregoing evidence concerning the nature, extent, history and causation of Voskuil's medical condition as a sword to establish unusually severe, ongoing mental injury and psychiatric disorder.

B. This Is Not a Case In Which Voskuil Simply Stood In Contempt To Preserve the Psychotherapist Privilege.

Voskuil repeatedly claims that she utilized the proper procedures in good faith to simply stand in contempt in order to consistently claim and preserve her legally justifiable psychotherapist privilege through the appellate process. *Petition*, 5-6, 14-18.

In fact, Voskuil was sanctioned by the District Court because she exhibited a pattern of misconduct, made intentional

and willful misrepresentations designed to mislead the District Court, and was deliberately evasive, disobedient and disrespectful to the Court and opposing counsel as described below.

After the District Court affirmed the Magistrate Court's order compelling production of Voskuil's psychotherapist records, Voskuil allowed all applicable time periods to immediately reconsider or appeal that order expire. R.Vol. 10, p. 11:12-24; 35:10-17. Voskuil knowingly and intentionally decided to forego an appeal by mandamus of the District Court Order signed February 24, 1999 and willfully and intentionally failed to comply with such order. R. Vol. 10, p. 8:16-10:18; 15:7-16:8; 16:8-17:6; 77:15-78:1.

The transcript of the hearing of Defendant's Motion for Contempt and Sanctions on April 23, 1999 establishes that Voskuil and her attorney admitted they had disobeyed the District Court Order signed February 24, 1999. R. Vol. 10, p. 8:16-10:18; 77:15-78:1. The District Court made repeated inquiries as to whether Voskuil and her attorney intended to continue to willfully disobey the Court's orders in the future and refuse to produce the requested discovery including: (i) at least 7 inquiries made directly to Ms. Nadine King-Mays, the attorney for Voskuil; R. Vol. 10 p. 11:12-11:19; 13:19-14:8; 15:8-15:12; 16:8-16:10; 16:15-16:6; 16:20-16:21; 17:1-17:3; and (ii) at least seven 7 additional inquiries were made directly to Voskuil. R. Vol. 10, p. 17:7-17:22; 19:21-19:22; 19:25; 20:2-20:3; 20:6-20:8; 20:10-20:15; 20:20-21:7.

Ms. King-Mays initially unequivocally refused to comply with the Court's order. R. Vol. 10, p. 16:8-16:14; 16:15-16:19; 16:20-17:6. Voskuil, agreed with her attorney and also unequivocally refused to comply with the Court's order. R. Vol. 10, p. 17:7-18:13; 19:21-19:24; 19:25-20:1; 20:6-20:9; 20:12-20:17; 21:6-21:10. The District Court repeatedly

admonished Voskuil and her attorney for their contempt of Court and warned Voskuil that her case would likely be dismissed with prejudice if she failed to comply with the Court's orders. R. Vol. 10, p. 13:19-14:9; 15:8-15:12; 20:2-20:5; 36:22-37:16; 42:18-42:23.

The District Court repeatedly explored whether lesser sanctions, other than dismissal, would be effective and whether Voskuil would comply with the Court's orders if restrictions, in the nature of a confidentiality/protective order, were added to the Court's order. R. Vol. 10, p. 24:14-24: 20; 33:25-34:6; 36:22-37:16; 42:18-42:23; 42:25-43:4; 43:23-44:5; 46:22-47:8; 48:4-48:8; 58:7-58:11; 58:16-58:22. Initially, Voskuil gave evasive, incomplete answers as to whether she would comply if a confidentiality/protective order were added to the District Court's order. R. Vol. 10, p. 24:21-25:16; 34:6-34:8; 37:17-38:13; 43:5-43:22; 44:4-44:5; 47:2-47:9; 48:9-48:17.

The District Court informed Voskuil and her attorney that although the Court had determined that dismissal with prejudice of Voskuil's lawsuit was entirely appropriate, the Court would take a brief recess to allow Voskuil and her attorney one last opportunity to mitigate their contempt by agreeing to comply with the Court's orders. R. Vol. 10, p. 42:14-48.3. After the recess, Voskuil clearly and unequivocally agreed to obey the District Court's orders and produce the requested documents and information if the Court added the restrictions in the nature of a confidentiality/protective order outlined by the Court. R. Vol. 10, p. 48:3-48:8;58:7-58:15; 58:16-59:2; 75:15-75:19.

The District Court found that Voskuil was at fault for failing to timely raise or argue that a confidentiality/protective order should be added to the Court's order. R. Vol. 10, p. 49:5-57:19; 60:10-61:24. Voskuil had never previously offered to settle the controversy by proposing a confidentiality/protective order as a compromise. Voskuil had previously unequivocally refused to produce the documents and information. R. Vol. 10, p. 65:17-71:24.

The District Court outlined Voskuil's prior misconduct which included evidence that: (i) Voskuil had repeatedly failed to comply with the Court's orders; (ii) Voskuil's attorney had previously been sanctioned by the Magistrate Court for filing a frivolous motion; and (iii) Voskuil had been dilatory in filing pleadings on 10-12 occasions. R. Vol. 10, p. 41:14-42:12; 82:10-82:17. The District Court characterized Voskuil's conduct as deliberately evasive, disobedient and disrespectful toward the court and opposing counsel. R. Vol. 10, p. 34:20-34:25; 37:6-37:16; 67:6-67:8; 67:11-68:3; 68:13-68:23; 70:1-70:6; 73:15-73:18; 77:19-77:22; 82:10-82:17; 86:15-87:22.

On June 14, 1999, the District Court granted EHC's Motion for Contempt and Sanctions, held Voskuil and her attorney in contempt of court and again ordered Voskuil to answer and produce the requested discovery. R. 1377, 1382-83. The District Court found:

> (a) Plaintiff's counsel stated on the record that she did not plan to comply with the court's orders requiring production.
>
> (b) Voskuil confirmed that she had not complied with the Court's Order and "did not adequately justify her failure to do so, and presented no other relevant defense for her failure to comply."
>
> (c) "Although there is a clear record of contumacious conduct on the part of Plaintiff and her counsel, *and dismissal of this action with prejudice is justified*, the court will not impose such a draconian remedy" since "*lesser sanction will obtain compliance.*"
>
> (d) "Plaintiff and her counsel have agreed to produce the documents as long as disclosure of the documents is reasonably limited."

> (e) Voskuil was at fault for failing to timely raise or argue that a confidentiality/protective order should be added to the Court's order since the issue was first raised by the Court. R. 1378-80.

The District Court ordered as follows:

> Plaintiff and her counsel shall produce the documents in question and otherwise comply with the orders previously entered by the United States Magistrate Judge and this court by June 22, 1999, and Plaintiff and her counsel shall pay the monetary sanction to Defendant by July 11, 1999. If Plaintiff fails to comply with the court's order regarding either of those dates, Plaintiff's claims *will be dismissed with prejudice*. R. 1383.

The District Court further held that the assertion of a psychotherapist privilege by Voskuil's physician as opposed to Voskuil herself, which was filed 2 1/2 years after the deadline to object to EHC's discovery requests, was filed "far too late and is therefore waived." R. 1379.

Despite the repeated promises made by Voskuil and her attorney during the hearing on April 23, 1999, both failed to comply with the District Court's June 22, 1999 deadline to produce the relevant documents and answer the subject interrogatories and the July 11, 1999 deadline to pay the monetary sanctions ordered by the Court. Petition, p. 7. Due to the failure of Voskuil and her attorney to produce the requested discovery and pay the monetary sanctions imposed by the Court, EHC filed Defendant's Motion to Enforce Contempt Sanctions and Brief on June 28, 1999. R. 1399. On July 1, 1999, Judge Lindsay signed an Order of Dismissal and Judgment dismissing Voskuil's lawsuit with prejudice. R. 1410.

REASONS FOR DENYING THE WRIT

I. The Courts Below Correctly Applied the Correct Analysis on Waiver of the Psychotherapist/Patient Privilege (Question Presented No. 1)

Voskuil has waived the psychotherapist privilege recognized by this Court in *Jaffee* and its progeny by placing her mental condition at issue in her pleadings, discovery responses and the introduction of evidence as both a sword and shield during judicial and administrative proceedings. This is not a "garden variety" Title VII claim for emotional damages. Voskuil has admitted to a preexisting mental condition, diagnosed as "Major Depression, *Recurrent*" which spanned over 15 years, including in 1982-1983 and then again at least four months *prior* to her employment at EHC. Voskuil is not alleging (and the evidence does not show) the expected mental injuries customarily associated with sexual harassment claims, but rather, concerns extreme episodes of depression, thoughts of suicide and an inability to work for the rest of her life. EHC was entitled to discover the nature, extent, history and causation of Voskuil's alleged disability and damages.

In *Jaffe v. Redmond*, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (U.S. Ill. 1996), the Supreme Court recognized for the first time a psychotherapist-patient privilege in certain situations. *Jaffe*, as cited by the Magistrate Court, concludes "[w]e hold that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Civil Evidence." *Jaffe* at 1931, cited at Vol. 9, p. 39:17-23. The Magistrate Court clearly ruled in EHC's favor based not upon the existence or non-existence of the psychotherapist privilege, but rather based upon a finding of a *waiver* of the privilege, assuming it exists. Vol. 9, p 40:4-8. *Jaffe* recognized that the psychotherapist privilege, like any

other privilege, may be waived. *Jaffe*, at 1931 n.14. Unfortunately, *Jaffe* offered little guidance on the situations in which a patient may waive the psychotherapist privilege since it determined that it was neither necessary nor feasible to delineate the full contours of the newly recognized privilege.

Post-*Jaffe* caselaw, and the Magistrate Court, in findings reviewed and affirmed by the District Court and the Fifth Circuit, have expressly held that the psychotherapist privilege may be waived when a patient places his medical condition at issue. *See* R. Vol. 9, p. 40:4-44:22 wherein the Magistrate Court relies upon five post-*Jaffe* cases, including *Lanning v. Southeastern Penn. Transp. Auth.*, 1997 WL 597905 (E.D. Penn.); *Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127, 130 (E.D. Penn. 1997); *Kerman v. City of New York*, 1997 WL 666261 (S.D. N.Y.); *Doolittle v. Ruffo*, 1997 WL 151799 (N.D. N.Y.); and *Vann v. Lone Star Steakhouse and Saloon of Springfield, Inc.*, 967 F. Supp. 346, 350 (C.D. Ill. 1997). These post-*Jaffe* cases were the genesis of the broader view of waiver identified in Voskuil's First Question Presented. As discussed in paragraphs IV.A-C below, this broader view of waiver, rather than the more narrow view of waiver proposed by Voskuil, has been accepted by almost all of the courts which have considered the issue.

The most often cited case interpreting *Jaffe* and the broad view of waiver is *Sarko*, which identifies the following 4 methods of placing mental condition at issue:

(1) pleading a tort claim for emotional distress;

(2) *alleging a severe ongoing mental injury or psychiatric disorder*;

(3) offering expert testimony to support the claim; or

(4) when the plaintiff concedes his mental condition is in controversy (emphasis added).

Sarko, 170 F.R.D. 127, 130. *Sarko* emphasized that the plaintiff's allegations "that her depression has had a long term impact on her mental state" met the second category of cases in which a party places her mental condition in controversy. *Sarko* at 131. "[A]llowing a plaintiff to hide . . . behind a claim of privilege when that condition is placed directly at issue in a case would be simply contrary to the most basic sense of fairness and justice." *Vann* at 350 citing *Sarko* as persuasive.

In *Lanning*, the court considered similar categories of cases in which a plaintiff puts her mental condition at issue. The plaintiffs: (1) stipulated that plaintiffs would not seek damages for psychiatric/psychological injury; (2) stipulated that they would not offer expert testimony in support of their claim for emotional distress; (3) did not seek recovery for treatment of emotional distress; and (4) did not allege an independent tort-like action. Nevertheless, the court, citing *Sarko*, held that plaintiff can still attempt to establish plaintiff's emotional distress claim *through plaintiff's own testimony* so that the defendant "has a right to inquire into Plaintiff's pasts for the purpose of showing that their emotional distress was caused at least in part by events and circumstances that were not job related." *Lanning* at *2. The Magistrate Court adopted this finding and the District Court and Fifth Circuit reviewed and affirmed. R.Vol. 9, p. 44:7-12.

Voskuil, in addition to proposing a narrower view of waiver of the psychotherapist privilege, also attempts to differentiate her case by characterizing her claim as a mere "garden-variety" Title VII action. *Petition*, p. 9-10 citing *Sabree v. United Brothers of Carpenters & Joiners* 126 F.R.D. 422 (D. Mass. 1989). Clearly, Voskuil's assertion that she has removed all claims based upon emotional distress, psychic injury or

psychiatric disorder or severe, ongoing emotional distress is disproved by her own pleadings as detailed in paragraph A of the Statement of the Case. Voskuil is not alleging (and the evidence does not show) the expected mental injuries customarily associated with sexual harassment claims, but rather, her pleading refers to extreme episodes of depression, thoughts of suicide and an inability to work for the rest of her life. The evidence detailed above confirms multiple, pre-existing mental episodes and diagnosis of *recurrent* major depression, which may cause or contribute to Voskuil's injuries. This is not the type of "garden variety claim" with the alleged "emotional damages naturally flowing from that injury." *Sabree*, 126 F.R.D. 422, 426. Even *Sabree* concedes that there may be cases where an employee waives the psychotherapist privilege and places her mental condition at issue. *Sabree*, 126 F.R.D. 422, 426. EHC does not dispute that the cases are legion that suggest, as in *Sabree* that the employer is not entitled to discovery of medical records in a "garden variety" Title VII claim. However, the Magistrate Court made findings, reviewed and affirmed by the District Court and Fifth Circuit, which distinguish this case from a "garden variety" Title VII case. R. Vol. 9, p. 38:4-48:20;

II. The Courts Below Did Not Abuse Their Discretion (Question Presented No. 2)

Voskuil's Second Question Presented does not present any new, independent considerations governing Supreme Court certiorari review other than whether the Courts below abused their discretion in holding that the federal psychotherapist privilege, referenced in the First Question Presented, had been waived.

Voskuil's statement on p. 13 of her Petition that the applicable standard of review should have been a *de novo* standard of review, rather than an abuse of discretion standard

of review, conveniently ignores the fact that this is an appeal of a case dismissed with prejudice as a result of sanctions imposed by the District Court. "A district court's decision to dismiss a complaint with prejudice as a sanction for violation of a discovery order may be reversed only if it amounts to an abuse of discretion." *Prince v. Poulos*, 876 F.2d 30, 32 (5th Cir. 1989) citing *NHL v. Metropolitan Hockey Club, Inc.*, 96 S. Ct. 2778, 2780-81 (1976). The issue is not whether the reviewing court would have imposed the same sanctions as did the district court; the question is whether the district court abused its discretion in so doing. *NHL*, 96 S. Ct. 2778, 2780.

The underlying discovery order was an appellate review by the District Court of Voskuil's objections to a *nondispositive* pretrial discovery order of a U.S. Magistrate Judge pursuant to F.R.C.P. 72(a) and 28 U.S.C. § 636(b)(1)(A). F.R.C.P. 72(a) provides that a "district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be *clearly erroneous or contrary to law*." (emphasis added). *Castillo v. Frank*, 70 F.3d 382, 385 (5th Cir. 1995). "A factual finding is not clearly erroneous unless although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *RTC v. Sands*, 151 F.R.D. 616, 619 (N.D. Tex. 1993). The *de novo* standard of review *does not* appear anywhere in F.R.C.P. 72(a) as Voskuil incorrectly suggests. Voskuil mistakenly cites the *de novo* standard of review which is reserved for *dispositive* magistrate rulings under F.R.C.P. 72(b). The District Court itself made a finding, citing *Castillo*, that the magistrate's order was on a *nondispositive* pretrial matter, a finding which Voskuil did not challenge by point of error in either the Fifth Circuit or this Court. R. 1292. Voskuil is not entitled to review of arguments and evidence not seasonably raised before the magistrate, the district court or the Fifth Circuit. *Baker v. Ace Advertisers Service*, 153 F.R.D 38, 43 (1992).

Even if the proper standard was a *de novo* review, the District Court emphatically denied Voskuil's allegations on page 13 of her Petition that the District Court failed to give serious consideration or perform a thorough review of the objections, evidence, record, and other pleadings. R. 1408-1409; 1410 at 1411. The District Court specifically found, and the Fifth Circuit affirmed, that the District Court considered the "motions, responses, replies, oral argument of counsel, comments of the Plaintiff (i.e. testimony) and the applicable law." R. 1377, 1292; Vol. 10, p. 2:19-23.

The "review of a district court's sanction for the violation of one of its discovery orders also, necessarily involves a review of the underlying discovery order". *F.D.I.C v. Connor*, 20 F.3d 1376, 1381 (5th Cir. 1994). However, the appellate court "review of the underlying discovery order is deferential; [t]he trial court's exercise of discretion regarding discovery orders will be sustained absent a finding of abuse of that discretion to the prejudice of a party." *Ibid.*

III. The Courts Below Correctly Held That Voskuil Was Not Legally Justified In Resisting Discovery And Seeking Appellate Review (Question Presented No. 3)

The Third Question Presented by Voskuil, again, does not present any new, independent considerations compelling Supreme Court certiorari review other than whether Voskuil was legally justified, based upon the psychotherapist privilege identified in Voskuil's First Question Presented, in resisting discovery and seeking appellate review. As discussed in the Statement of the Case, para. B. above, this is not a case in which Voskuil simply stood in contempt of Court to preserve the psychotherapist privilege.

The District Court correctly held, and the Fifth Circuit affirmed, that a party seeking to establish a civil contempt need only evidence: (1) that a court order was in effect; (2) that the

order required certain conduct by the respondent; and (3) that the respondent failed to comply with the court's order." *Petition App.*, p. 19-20 citing *FDIC v. LeGrand*, 43 F.3d 163, 170 (5th Cir. 1995). Voskuil has conceded that this Fifth Circuit standard was met since Voskuil and her attorney admit that they disobeyed the District Court Order signed February 24, 1999. R. Vol. 10, p. 8:16-10:18; 77:15-78:1.

F.R.C.P. 37(c) specifically authorizes dismissal as an appropriate remedy for disobedience of court discovery orders. Dismissal of Voskuil's claims was especially appropriate based upon the Court's mandatory warning and order that in the event Voskuil and her attorney failed to pay the monetary sanctions and comply with the discovery orders, "Plaintiff's claims *will be dismissed with prejudice*." R. 1383. *NHL*, 96 S. Ct. 2778, 2780.

The District Court found, and the Fifth Circuit affirmed, that Voskuil and her attorney willfully and intentionally misled the District Court as to their intentions to comply with the Court's orders and no less drastic sanctions would likely result in compliance. During the hearing on April 23, 1999, both Voskuil and her attorney were informed that the Court had determined that "death penalty" sanctions in the nature of a dismissal of Voskuil's lawsuit with prejudice were appropriate. R. 1379-80. However, in an effort to comply with the Court's duty to explore whether the deterrent value of the proposed sanctions could be substantially achieved by less drastic sanctions, the District Court proposed, and Voskuil and her attorney clearly and unequivocally agreed, that the documents and information be produced subject to a Court ordered confidentiality/protective order designed to shield sensitive documents from unnecessary disclosure. R Vol. 10, p. 48:3-48:8; 58:7-58:15; 58:16-19:2; 75:15-75:19.

The District Court signed its Memorandum Opinion and Order which held that "[a]lthough there is a clear record of contumacious conduct on the part of [Voskuil] and her counsel, and dismissal of this action with prejudice is justified, the court will not impose such a draconian remedy" since "a lesser sanction will obtain compliance." R 1379-80. Relying on Voskuil's promises, the Court outlined the "lesser sanction" than dismissal which it had decided to impose ie. the production of the documents and information subject to the proposed confidentiality/protective order R. 1380-81.

Despite the assurances that Voskuil and her attorney had made during the hearing, Voskuil subsequently refused to produce the subject documents and information. Voskuil never objected to or assigned error to the wording of the proposed confidentiality/protective order or the Memorandum Opinion and Order ordering production, nor did Voskuil ever give the Court any additional explanation for Voskuil's refusal to abide by the concessions made in open court. As more fully discussed in paragraph IV.E. below, Voskuil failed to properly raise, perfect and preserve her present claims of an inability to pay the monetary sanctions. Voskuil was offered, but unexplainably rejected the "less drastic sanction" proposed by the District Court. Therefore, the deterrent value of F.R.C.P. 37 could not be achieved by less drastic sanction than dismissal.

IV. Other Considerations Justifying Denial of the Petition

A. Certiorari Should Be Denied Since There Is No Conflict Among The Circuit Courts of Appeal

Voskuil's petition for writ of certiorari should be denied for the reason that there is no conflict among the Circuit Courts of Appeal on the questions presented. In Voskuil's First Question Presented, Voskuil asserts that there is a "conflict between the circuits regarding what constitutes a waiver of the psychotherapist/patient privilege under *Jaffee v. Redmond*."

However, Voskuil fails to cite even a single Court of Appeals case regarding waiver of the psychotherapist privilege by a patient placing his or her medical condition at issue. Supreme Court Rule 10(a), which lists certain considerations governing the decision to grant review by writ of certiorari, provides that [r]eview on a writ of certiorari is not a matter of right, but of *judicial discretion*" and "will be granted only for *compelling reasons*" such as "(a) a *United States court of appeals* has entered a decision in conflict with the decision of another *United States court of appeals* on the same important matter." (emphasis added). Since Voskuil has cited only federal district court cases, Voskuil can not meet the standard of Supreme Court Rule 10(a). In fact, research by EHC's counsel has discovered only a single Court of Appeals case interpreting the waiver of the *Jaffee* psychotherapist privilege by a patient placing his or her mental condition at issue discussed in paragraph IV.D.2. below. *See Schoffstall v. Henderson*, 223 F.3d 818, 822 (8th Cir. 2000).

B. The Alleged Conflict Between The Circuits Results From a Single Massachusetts District Court

On page 11 of her Petition, Voskuil claims that developing case law focuses on two divergent views with regard to the psychotherapist privilege. Voskuil identifies a broader view (represented by *Sarko* and *Vann* cited by the Magistrate Court below) and a narrower view which Voskuil states is represented by three cases. Only one of these cases actually adopts the narrower view recommended by Voskuil. *See Vanderbilt v. City of Chilmark*, 174 F.R.D. 225, 229-230 (D. Mass. 1997) — plaintiff only waives psychotherapist/patient privilege by introducing evidence (by witness or testimony) regarding the substance of her conversations with her psychotherapist in order to further her claim of emotional damage.

The second cited opinion, which was issued by a magistrate court, was subsequently modified by a reviewing California district court and declines to follow the narrower view identified in *Vanderbilt*. *Fritsch v. City of Chula Vista*, 187 F.R.D. 614 (S.D. Cal. 1999), *opinion modified by*, 196 F.R.D. 562, 565-568 (S.D. Cal. 1999). The district court in *Fritsch* held that the narrower view in *Vanderbilt* is unfair because the defendants should have access to evidence and explore the possibility that plaintiff's emotional state was caused by other factors in her life at the time. *Fritsch*, 196 F.R.D. 562, 569. The district court in *Fritsch* "concludes that the Supreme Court would adopt the broad view of waiver." *Fritsch*, 196 F.R.D. 562, 568.

The final opinion cited by Voskuil also, in fact, declines to follow the *Vanderbilt* narrower view and instead adopts the broader view applied by the Magistrate Court below. *Jackson v. Chubb Corporation*, 193 F.R.D. 216, 224-225 (D. NJ. 2000) — "[h]aving closely reviewed cases supporting both the broad and narrow views on waiver, this Court is convinced that the broad view of waiver best serves the respective interests of the parties to a lawsuit."

The basis of Voskuil's alleged "conflict among the circuits" is therefore reduced to a single Massachusetts District Court case which has been harshly criticized and distinguished as discussed below. The national impact of denying Voskuil's petition for writ of certiorari would be limited to a single Massachusetts district court, certainly not an intolerable conflict which requires immediate resolution by this Court. The Courts of Appeal, not the Supreme Court, have the duty to maintain uniformity within their respective circuits and to supervise the decisions of the various district courts therein. *Wisniewski v. United States*, 353 U.S. 901, 902, 77 S. Ct. 633, 634 (1957).

C. The Alleged Narrower View Identified In Vanderbilt Has Been Discredited

A Westlaw keycite check reveals that at least five cases have disagreed with the analysis in *Vanderbilt* and at least three cases have declined to follow *Vanderbilt*. Respondent, therefore, counts at least eight cases in just three years which have disagreed or declined to follow the single Massachusetts District Court in *Vanderbilt*. Therefore, to the extent there is a conflict among the circuits, which EHC denies, the conflict will likely be resolved as a result of future cases in the Courts of Appeals.

D. Supreme Court Consideration of This Evolving, Unsettled Area is Premature

1. *The Jaffee Case Was Decided Only Five Years Ago.*

This Court only recognized the psychotherapist privilege five years ago in *Jaffee*. The Court, at the time, noted that "it is neither necessary nor feasible to delineate its full contours in a way that would govern all conceivable future questions in this area. *Jaffee*, 518 U.S. 1, 18, 116 S. Ct. 1923, 1932. The foregoing statement is equally appropriate just five years later.

2. *Only a Single Circuit Court of Appeals, the Eighth Circuit, Has Even Reached the Question Presented by Petitioner.*

The only reported decision by a U.S. Court of Appeals on the question presented is *Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000) which held that the psychotherapist privilege is waived when a party places her medical condition at issue. *Schoffstall* cites the broader view of *Sarko* and *Vann* cited by the Magistrate Court below as persuasive. *Schoffstall* also cites, but disagrees with *Vanderbilt*, the case relied upon by Voskuil to promote a narrower view of waiver of the psychotherapist privilege. However, even the *Schoffstall* case devotes only a single paragraph to the resolution of this issue. Therefore, not even the Eighth Circuit has fully delineated the full contours of the psychotherapist privilege.

3. *Even the Decisions of the Courts Below Were Unpublished and/or Failed to Fully Elaborate and Develop Their Analysis of the Psychotherapist/ Patient Privilege.*

Neither the District Court nor the Fifth Circuit decisions below were designated for official publication. By failing to meet the criteria for publication pursuant to Rule 47.5.1 of the Fifth Circuit Local Rules, the Fifth Circuit determined that, among other things, the case did not: (i) in any way interest persons other than the parties to the case; (ii) create or resolve a conflict of authority either within the circuit or between this circuit and another; and (iii) concern or discuss a factual or legal issue of significant public interest. The entire Fifth Circuit opinion is only three pages long and the Fifth Circuit opinion, since unpublished, did not even attempt to fully elaborate, discuss and/or develop the legal issues involved in the case. In fact, the Fifth Circuit opinion does not cite a single case as precedent. This Court should avoid a premature adjudication of a question presented, especially when the Court is requested to review a new or novel question not yet fully addressed by the appropriate courts below. *Arizonans For Official English v. Arizona*, 520 U.S. 43, 78-79, 117 S. Ct. 1055, 1074 (1997).

4. *This Court Should Wisely Allow These Issues to Percolate In the Lower Courts And Be Resolved by Additional Courts of Appeal Before Granting Certiorari.*

A petition for writ of certiorari should be denied where the question requires "further study" in the lower courts "before it is addressed by this Court." *McCray v. New York*, 461 U.S. 961, 963, 103 S. Ct. 2438, 2439 (1983). To grant certiorari review of the Fifth Circuit decision would deprive this Court of potentially valuable discussion of these issues by lower courts. *United States v. Mendoza*, 464 U.S. 154, 160, 104 S. Ct. 568,

572 (1984) — this Court benefits from "permitting several Courts of Appeal to explore a difficult question before this Court grants certiorari." *See also E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26, 97 S. Ct. 965, 978 n.26 (1977) — this case "exemplifies the wisdom of allowing difficult issues to mature through full consideration by the Courts of Appeal."

E. Voskuil Failed to Properly Raise, Perfect and Preserve Her Claim of an Inability to Pay the Monetary Sanctions

Voskuil's petition for writ of certiorari should be denied because Voskuil failed to properly raise, perfect and preserve on appeal the alleged inability of Voskuil and her attorney to pay the monetary sanctions assessed against them by the District Court. *See, e.g., Silva v. Witschen*, 19 F.3d 725, 732-733 n.15 (1st Cir. 1994) "Inability to pay what the court would otherwise regard as an appropriate sanction should be treated as reasonably akin to an affirmative defense, with the burden upon the parties being sanctioned to come forward with evidence of their financial status." *White v. GMC*, 908 F.2d 675, 685 (10th Cir. 1990). If the contemptor offers no evidence as to her inability to comply or stands mute, she has not met her burden. *Huber v. Marine Midland Bank*, 51 F.3d 5, 10 (2d Cir. 1995).

After the contempt hearing, Voskuil was given an additional opportunity to object to the attorneys' fees requested by EHC by affidavit, but again failed to raise Voskuil's and her attorneys' alleged inability to pay the monetary sanctions in her objections to imposition of monetary sanctions filed April 27, 1999. Similarly, Voskuil failed to challenge the reasonableness of EHC's attorneys' fees during the sanctions phase by offering expert testimony or other evidence refuting or contradicting the reasonableness of EHC's attorneys' fees. *Silva*, 19 F.3d 725, 732-733.

Finally, on June 21, 1999, almost two months after the original hearing of the motion for contempt and for sanctions, Voskuil filed a motion to stay pending Voskuil's application for writ of mandamus in which Voskuil briefly concluded that Voskuil and her attorney did not have funds sufficient to pay the monetary sanctions. R. 1390. However, Voskuil presented no evidence to the District Court of the financial condition of Voskuil and her attorney or of their inability to pay the monetary sanctions. *Silva*, 19 F.3d 725, 732-733 n.15. Conclusory statements by Voskuil in a single, unverified pleading are inadequate to carry her burden. *Huber*, 51 F.3d 5, 10. There is **no evidence in the record** which indicates or even suggests that either Voskuil or her attorney were unable to pay the monetary sanctions. *Landscape Properties, Inc. v. Whisenhunt*, 127 F.3d 678, 685 (8th Cir. 1997).

Subsequently, Voskuil failed to assign a point of error in her appeal to the Fifth Circuit asserting their alleged inability to pay the monetary sanctions. A question presented in a petition for writ of certiorari but not raised in the court of appeals is not properly before this court. *Delta Airlines v. August*, 450 U.S. 346, 362, 101 S. Ct. 1146 (1981). Similarly, this Court should decline to consider questions presented in a petition for writ of certiorari that have not been addressed or considered by the lower courts. *Patrick v. Burget*, 486 U.S. 94, 99, 108 S. Ct. 1658, 1662 n.5 (1988). It would be improvident to grant Voskuil's petition for writ of certiorari since the evidentiary appellate record is undeveloped and insufficient to resolve the factual dispute concerning their alleged inability to pay. *Smith v. Legg*, 24 F.3d 650, 655 (5th Cir. 1994). *See Wainwright v. City of New Orleans*, 392 U.S. 598, 599, 88 S. Ct. 2243, 2245 (1968) — record described as "too sketchy" for consideration by writ of certiorari.

F. Certiorari Should Be Denied Because This Case Is Properly Decided on More Narrow Grounds Than the Psychotherapist Privilege

It is instructive that the Fifth Circuit did not even reach or discuss the question of the waiver of psychotherapist privilege below. Rather, the Fifth Circuit decided the case on more narrow grounds. The Fifth Circuit simply determined that the District Court did not abuse its discretion since: (i) Voskuil, *herself*, agreed to release the medical records; (ii) Voskuil had been warned that continued failure to produce the records would result in dismissal with prejudice; (iii) Voskuil twice intentionally disregarded the district court's orders; (iv) Voskuil misrepresented her future course of conduct to the district court; and (v) Voskuil was originally granted a lesser punishment than dismissal with prejudice but failed to comply with the district court's orders. Voskuil's petition for writ of certiorari should be denied since the Supreme Court is likely to decide the case on the narrower grounds used by the Fifth Circuit Court, rather than on the questions presented.

G. Certiorari Should be Denied Since this Case Presents No Compelling National Question

Voskuil's petition for writ of certiorari should be denied because the case presents questions of importance merely to the litigants and not an issue of immediate public significance, especially since: (i) Voskuil has failed to establish a conflict among the circuit Courts of Appeal; and (ii) the Fifth Circuit decided this case on narrow grounds not implicating the psychotherapist privilege. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79, 75 S. Ct. 614, 619-620 (1955). A writ of certiorari should be sparingly exercised with necessary restraint and caution based upon the considerations such as listed in Supreme Court Rule 10. *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 448-449, 79 S. Ct. 921, 928 (1959). Supreme Court

Rule 10 specifically requires that "a petition for writ of certiorari will be granted only for *compelling* reasons." This Court has recognized that

> it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.

Rice, 349 U.S. 70, 79, 75 S. Ct. 614, 619-620.

H. Voskuil's Petition for Writ of Certiorari Should be Denied Because it Turns Solely Upon an Analysis of the Particular and Unique Facts Involved

This case has already been decided adversely to Voskuil by three separate courts including the Magistrate Court, the District Court and the Fifth Circuit. As discussed above, Voskuil's petition relies upon many facts which are: (i) denied or in dispute by EHC; and (ii) in conflict with the fact findings by the Magistrate Court, which were affirmed by both the District Court and the Fifth Circuit. Supreme Court Rule 10 provides "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." "[A] Court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Goodman v. Lukens Steel Company*, 482 U.S. 656, 665, 107 S. Ct. 2617, 2623 (1987). The Supreme Court should not grant a petition for writ of certiorari to review evidence and discuss specific facts. *Texas v. Mead*, 465 U.S. 1041, 104 S. Ct. 1318, 1320 (1984). Certiorari should only be

granted when the record reveals that the facts appear with sufficient clarity to enable this Court to decide the question presented. *Gilbert v. California*, 388 U.S. 263, 269, 87 S. Ct. 1951, 1954 (1967).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

STEPHEN A. COKE
WESNER COKE & CLYMER, P.C.
Attorneys for Respondent
One Galleria Tower, Suite 2020
13355 Noel Road
Dallas, Texas 75240
(972) 770-2600